

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA, PETITIONER,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1942.

CERTIORARI GRANTED MARCH 2, 1942.

SUPREME COURT OF THE UNITED STATES

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DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF GEORGIA, AT-
LANTA DIVISION.

Civil Action, File 2373.

STATE OF GEORGIA,

versus

HIRAM W. EVANS, JOHN W. GREER, JR., THE
AMERICAN BITUMULS COMPANY, SHELL OIL
COMPANY, INC., EMULSIFIED ASPHALT REFIN-
ING COMPANY.

COMPLAINT.

I.

Plaintiff is the State of Georgia, appearing by and through Ellis G. Arnall, Attorney General of the State of Georgia, upon direction of Hon. Eugene Talmadge, Governor of the State of Georgia.

II.

The defendant, Hiram Wesley Evans, is a resident of the State of Georgia, Fulton County, Georgia, and of the Northern District of Georgia. The defendant, John W. Greer, Jr., is a resident of the State of Georgia, Lanier County, Georgia, and of the Middle District of Georgia. The defendant, The American Bitumuls Company, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business at San Francisco, California, but being found and having an agent and transacting business in the State of Georgia and the Northern District of Georgia. The defendant,

Shell Oil Company, Inc., is a corporation incorporated under the laws of the State of Virginia, having its principal place of business at St. Louis, Missouri, but being found and having an agent and transacting business in the State of Georgia and the Northern District of Georgia. The defendant, Emulsified Asphalt Refining Company is a corporation incorporated under the laws of the State of South Carolina, having its principal place of business at Charleston, S. C., but being found and having an agent and transacting business in the State of Georgia, and the Northern District of Georgia.

III.

This action arises under the Act of October 15, 1914, Chapter 323, Section 4; 38 Statutes, 731; U. S. C. Title 15, Section 15; and the Act of July 2nd, 1890, Chapter 647, Section 1; 26 Statutes, 209; U. S. C. Title 16, Section 1, as hereinafter more fully appears.

IV.

In all the purchases of emulsified asphalt made by the State Highway Board of Georgia as hereinafter alleged said Board was acting for and on behalf of the State Highway Department of Georgia and the State of Georgia, and said asphalt was purchased for use by the State of Georgia upon the roads, streets and highways under the jurisdiction, management and control of the State Highway Board of Georgia. Payments for said asphalt were made out of public funds derived from taxation and payable into the State Treasury of Georgia.

V.

At all times hereinafter alleged, the defendant, Hiram Wesley Evans, was engaged in the business of selling and promoting emulsified asphalt, and representing companies

(among others the companies herem named as defendants) manufacturing emulsified asphalt and selling same in the State of Georgia, and was doing business as the Southeastern Construction Company at Atlanta, Georgia.

VI.

At all times hereinafter alleged, and in the performance of all acts alleged, the defendant, John W. Greer, Jr., was employed by the State Highway Board of Georgia as purchasing agent at Atlanta, Georgia, and was acting in said capacity.

VII.

At all times hereinafter alleged and with respect to the matters alleged, the defendant corporations and companies herein named were manufacturers of emulsified asphalt and were doing business manufacturing said asphalt outside the State of Georgia and which moved into the State and was the subject of interstate commerce, and doing business in the State of Georgia selling more than ninety per cent of all emulsified asphalt sold for use in the State of Georgia. During said time said defendants were acting through their respective duly authorized officers, agents and representatives and contracts, negotiations, schemes, devices and practices hereinafter complained of were entered into, made and performed by said officers, agents or representatives with the knowledge and sanction of the respective corporations represented by the same.

VIII.

The emulsified asphalt manufactured by the defendant corporations was used in the State of Georgia during

the period beginning on or about April 20th, 1937, for the construction and maintenance of streets, roads and highways (under the jurisdiction and control of the State Highway Board of Georgia) as a binding, surfacing and paving material, and the defendant, John W. Greer, Jr., was the purchasing agent of said Board through whom said asphalt was purchased. During the period beginning on or about April 20th, 1937, and ending on or about December 1st, 1938, more than eighty-five per cent of all emulsified asphalt used in the State of Georgia was manufactured or processed in States other than Georgia, and the State Highway Board of Georgia was the principal purchaser, purchasing more than ninety per cent of all emulsified asphalt used in the State of Georgia. During said period the defendant corporations sold to the State of Georgia, on purchases made by the State Highway Board of Georgia, more than ninety-five per cent of all the emulsified asphalt purchased by said State Highway Board.

IX.

The locations of the refineries of the defendant corporations where emulsified asphalt so sold to the State Highway Board of Georgia during the period alleged in Paragraph VIII was manufactured or refined, and from which said emulsified asphalt was shipped into the State of Georgia to or for the State Highway Board, are as follows:

Name—Location of Refinery:

American Bitumuls Co., Baton Rouge, La. & Baltimore, Md.

Shell Oil Co. Inc., New Orleans, Louisiana.

Emulsified Asphalt Refining Co., Charleston, South Carolina.

X.

In making purchases of emulsified asphalt from defendant corporations, the State Highway Board of Georgia, purchased the same through a jobber or agent of said defendant corporations who was Hiram Wesley Evans, and the asphalt purchased was shipped in interstate commerce to or near the highway construction or maintenance job in the State of Georgia on which it was used, and the shipments hereinafter referred to were made by the defendant corporations from one or more of their refineries located in the States indicated above and into the State of Georgia.

XI.

During the period above alleged, purchases of emulsified asphalt were made from defendant corporations only after bids were advertised for and received. Under the law of Georgia and the custom, practice and policy of the State Highway Board of Georgia, the person, firm or corporation submitting the bid or offer to sell emulsified asphalt at the lowest price per gallon, provided such product met all specifications, tests and standards promulgated and established by said Board, was awarded the contract. It was the custom, practice and policy of the State Highway Board to notify all sellers or manufacturers of emulsified asphalt, doing business in this State, of the specifications, standards and tests of such product, when said Board desired to make purchases thereof, and to invite bids thereon. Under the law of Georgia and the custom, practice and policy of said Board, where quantities of emulsified asphalt were to be purchased of the value of more than \$500.00 competitive bids from dealers, jobbers or manufacturers of said product were required to be advertised for and received and purchases made from the lowest bidder.

XII.

The State Highway Board of Georgia is the executive and administrative head of the State Highway Department with full power and authority and in full control of the State Highway Department, a department and agency of the State of Georgia.

XIII.

Beginning in or about January, 1937, and continuing from day to day thereafter down to and until December 31st, 1938, the defendants herein named, with full knowledge of the facts as to the law, and the custom, policies and practices of the State Highway Board in making purchases of emulsified asphalt, did knowingly and unlawfully combine, conspire, agree and have a tacit understanding together with each other and with divers other persons to restrain a part of the trade and commerce in emulsified asphalt among the several States of the United States and did, in fact, restrain said trade and commerce in violation of Section I of the Act of Congress of July 2, 1890, (26 Stat. 209), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Anti-Trust Act.

XIV.

It was a part of said combination and conspiracy, and the object and purpose thereof to accomplish and to do the following, among other things, to-wit:

(a) To arbitrarily, unlawfully, unreasonably and knowingly raise, fix, control, set, stabilize and effect the price of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(b) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition between and among the defendant Evans and the defendant manufacturers of emulsified asphalt in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(c) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from competitors and prospective competitors of the defendant manufacturers of emulsified asphalt and defendant Evans, in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(d) To arbitrarily, unlawfully, unreasonably and knowingly prevent, suppress and eliminate competition from any source in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(e) To establish and maintain unreasonably high, excessive, monopolistic and non-competitive prices for emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

As a part of said unlawful combination and conspiracy, in pursuance thereof and in furtherance thereof and to effectuate its object and purpose, the said defendants did do and perform certain acts and things and overt acts, and did use divers means and methods, including the following, among other things, to-wit:

(a) In or about January, 1937, defendant, Hiram Wesley Evans organized and caused to be organized at Atlanta, Georgia, a partnership under the name of Southeastern Construction Company for the purpose of en-

gaging in the promotion and sale of emulsified asphalt in the State of Georgia.

(b) In or about April, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company entered into an agreement and understanding with one, A. W. Mohr, acting on behalf of the defendant, American Bitumuls Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said company were to be handled by said Evans. It was a part of said agreement and understanding that said American Bitumuls Company should submit bids in its own name to the State Highway Department of Georgia at prices directed by said Evans, and said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times during the period as above alleged, in Paragraph VIII.

(c) In or about July, 1936, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the Southeastern Construction Company, entered into an agreement and understanding with one, Alex McDougald, acting on behalf of the defendant, Emulsified Asphalt Refining Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said defendant, Emulsified Asphalt Refining Company, were to be handled by said Evans. It was a part of said agreement and understanding that the said Emulsified Asphalt Refining Company should submit bids in its own name to the State Highway Department of Georgia, at prices directed by said Evans, and he was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. This agree-

ment and understanding continued in force and effect at all times during the period first above alleged, in Paragraph VIII.

(d) In or about March, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company entered into an agreement and understanding with one, J. S. Sawyer, acting on behalf of defendant Shell Oil Company Inc., (or its predecessor corporation), whereby all sales in the State of Georgia of emulsified asphalt manufactured by said Shell Oil Company, Inc., (or its predecessor corporation), were to be handled by said Evans. It was a part of said agreement and understanding that the said Shell Oil Company, Inc., (or its predecessor corporation), should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans, and said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times during the period first above alleged, in Paragraph VIII.

(e) In or about May, 1937, defendants, together with divers other persons changed and caused to be changed the specifications and standards covering emulsified asphalt to be purchased by the State Highway Department of Georgia, so that only the emulsified asphalt manufactured by the defendant manufacturers of emulsified asphalt and handled and sold by defendant Evans, as aforesaid, would be acceptable and in accord therewith, thereby eliminating competition from competitive and prospective competitors of defendant Evans and of the defendant manufacturers of emulsified asphalt.

(f) In or about May, 1937, defendant, John W. Greer, Jr., acting in his capacity as purchasing agent for the

State Highway Department of Georgia, and in concert, collusion and conspiracy with defendant Evans, and in furtherance of the aforesaid combination and conspiracy, sent and caused to be sent to said defendant manufacturers of emulsified asphalt, several of their representatives, Southeastern Construction Company and defendant Evans notice of said change in specifications set forth in sub-paragraph (e) above, at the same time and thereafter failing and refusing to furnish said notice to competitors and prospective competitors of said defendant manufacturers of emulsified asphalt.

(g) At all times after the date of the change in said specifications and standards referred to in sub-paragraph (e) hereof, defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia, notified the defendant Evans and the defendant manufacturers of emulsified asphalt of the proposed purchases of emulsified asphalt, at the same time and thereafter failing and refusing to notify competitors and prospective competitors of said Evans and the said defendant manufacturers of emulsified asphalt.

(h) At all times after said change in the specifications, defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia and in concert, collusion and conspiracy with defendant Evans, refused to accept and rejected all bids submitted and attempted to be submitted by competitors and prospective competitors of the defendant Evans and said defendant manufacturers of emulsified asphalt, whether such bids of said competitors were lower than the bids submitted by said defendant manufacturers or not.

(i) The price contained in all emulsified asphalt bids submitted to the State Highway Department of Georgia

and the price paid by said Department for emulsified asphalt was dictated, controlled, set and fixed by the combination and conspiracy in the following manner:

(1) Pursuant to the arrangements and agreements set forth in sub-paragraphs (a) and (d) above, inclusive, defendant Evans submitted and caused to be submitted in the name of Southeastern Construction Company bids on emulsified asphalt to be purchased by the State Highway Department of Georgia. If said Southeastern Construction Company was the low bidder and was awarded the order for said asphalt, defendant Evans furnished the State Highway Department of Georgia with emulsified asphalt manufactured by said defendant, American Bitumuls Company.

(2) In further pursuance of the aforesaid arrangements and agreements, set forth in sub-paragraphs (a) and (d) inclusive, defendant Evans directed the price to be contained in bids submitted by defendant manufacturers of emulsified asphalt in their own names to the State Highway Department of Georgia.

(3) The said defendant manufacturers of emulsified asphalt, in submitting bids in their own names to the State Highway Department of Georgia submitted the price so directed by defendant Evans.

(4) The said defendant manufacturers of emulsified asphalt, acting as aforesaid, thereby permitted defendant Evans to predetermine which of said defendants should submit the lowest bid.

(5) The defendant manufacturer of emulsified asphalt submitting, in accordance with directions from defendant Evans, the lowest bid was awarded the contract or order

for emulsified asphalt by the State Highway Board of Georgia at the price so fixed and predetermined by defendant Evans as aforesaid.

(6) The defendant manufacturer of emulsified asphalt receiving said contract or order from the State Board of Georgia for emulsified asphalt, at the price fixed, controlled, set and predetermined as aforesaid, shipped in interstate commerce from its refinery located outside of the State of Georgia the emulsified asphalt so purchased and ordered to or for the State Highway Board of Georgia at the delivery point within the State of Georgia as so ordered by said Board.

(j) On or about March 29th, 1938, defendant, John W. Greer, Jr., acting in his official capacity as purchasing agent for the State Highway Department of Georgia, attempted to reject a bid submitted by one, Samuel E. Finley, selling emulsified asphalt manufactured by the Texas Company, which had been submitted as a result of an invitation extended by a subordinate of said John W. Greer, Jr., without the latter's knowledge and through inadvertance, and the said bid was lower than the bid submitted by the defendant Evans and the defendant manufacturers of emulsified asphalt herein named. The said John W. Greer, Jr., on said occasion, upon discovering that the said low bid had been submitted by the said Finley, and that the said Finley had, through inadvertance of a subordinate of Greer, been invited to bid thereon, attempted to cancel all invitations, and extend new invitations to the defendant Evans and the said defendant manufacturers, and exclude the said Finley from further bidding.

(k) As a result of said incident referred to in subparagraph (j) above, and in or about April, 1938, defend-

ant, John W. Greer, Jr., acting in concert and collusion with defendant Evans, in furtherance of said combination and conspiracy, knowingly and deliberately divided large orders for emulsified asphalt for single road projects under the jurisdiction of the State Highway Department of Georgia into numerous small orders of less than \$500.00 each, for the purpose of awarding said small orders to the defendant Hiram Wesley Evans without receiving competitive bids therefor, at a price fixed and agreed upon by said defendants.

(1) During the period from April, 1937, to March 28th, 1938, inclusive, as a result of the operation of said combination and conspiracy, through the arrangements, agreements and acts set forth in sub-paragraphs (a) to (k) inclusive, defendant Hiram Wesley Evans received a commission or other compensation on each gallon of emulsified asphalt purchased by the State Highway Board of Georgia, at prices raised, enhanced, fixed, maintained and controlled as aforesaid.

XVI.

While said conspiracy, arrangement and understanding between the defendants named herein was in existence, the State Highway Department purchased from defendant, Hiram Wesley Evans, doing business as Southeastern Construction Company, a total of 2,480,980 gallons of emulsified asphalt at and for the sum of \$285,019.96, which price was unreasonable and excessive due to the unlawful and illegal conspiracy, agreements and arrangements between the defendants named herein to raise, fix, maintain and control said prices. The reasonable price at which said amount of emulsified asphalt could have been purchased under natural and free competitive conditions was \$199,222.69. As a result of said con-

spiracy so existing at the time these purchases were made from said defendant the State of Georgia has suffered damage and injury in its property in the actual amount of \$85,797.27, and is entitled under Section 4 of said Sherman Anti-Trust Act, Title 15, U. S. C. A., Section 15, to threefold damages in the amount of \$257,391.81.

XVII.

During the existence of said illegal conspiracy, combination, agreement and arrangement, as aforesaid, the State Highway Department of Georgia purchased from the defendant, Emulsified Asphalt Refining Company, a total of 1,272,131 gallons of emulsified asphalt at and for the sum of \$131,376.56. The price paid to said defendant for said asphalt was, as a direct and proximate result of said illegal conspiracy, combination, agreement and arrangement whereby the price thereof was raised, fixed and determined by defendant Evans, excessive and unreasonable, in that the State Highway Department could have purchased said amount of asphalt in a free and competitive market, under natural competitive conditions, at and for the sum of \$102,152.11. The State of Georgia has, on account of said illegal conspiracy, combination, agreement and arrangement on the part of the Emulsified Asphalt Refining Company and the other named defendants herein, been actually injured and damaged in its property in the sum of \$29,224.45, and under Section 4 of said Sherman Anti-Trust Act (Title 15 U. S. C. A. Section 15) is entitled to threefold damages in the amount of \$87,673.35.

XVIII.

While said illegal conspiracy, combination, agreement and arrangement, as aforesaid, was in existence the State

Highway Department of Georgia, purchased from the defendant, Shell Oil Company, (or its predecessor corporation) in the manner above alleged the total of 689,055 gallons of emulsified asphalt at and for the price of \$68,-336.52, which price was excessive and unreasonable, in that the reasonable price and value of said amount of asphalt under free and natural competitive conditions was only \$55,331.11. As a direct and proximate result of said illegal conspiracy, combination, agreement and arrangement on the part of the Shell Union Company, the State of Georgia has been actually damaged and injured in its property in the sum of \$13,005.41, and by virtue of Section 4 of the Sherman Anti-Trust Law (Title 15 U. S. C. A. Section 15) is entitled to recover three-fold damages of said defendant in the amount of \$39,-016.23.

Wherefore, the State of Georgia prays judgments for said amounts as compensation for its injuries and damages sustained in the manner and the amounts as above alleged, together with interest thereon and costs.

Count II.

XIX.

Complainant does hereby reaffirm, reallege and incorporate as if herein set forth in full, and adopts by reference, all of the allegations set forth in Paragraph I through XII of Count I of this complaint, except Paragraph III.

XX.

This action arises under the Act of October 15th, 1914, Chapter 323, Section 4; 38 Statutes, 731; U. S. C., Title

15, Section 15 and the Act of July 2, 1890, Chapter 647, Section 2; 26 Statutes 209; U. S. C. Title 15, Section 2, as hereinafter more fully appears.

XXI.

Beginning in or about January, 1937, and continuing from day to day thereafter down to and until December 31st, 1938, the defendants herein named, together with divers other persons, well knowing all of the foregoing facts, knowingly and unlawfully did monopolize, attempt to monopolize, and did combine and conspire with each other and other persons to monopolize a part of the trade and commerce in emulsified asphalt among the several States of the United States, in violation of Section 2 of the Act of Congress, of July 2nd, 1890, (26 Stat. 209; Title 15, U. S. C. A. Section 15), entitled "An act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Anti-Trust Act.

XXII.

It was a part of said unlawful monopoly, attempt to monopolize, and combination and conspiracy to monopolize, and the object and purpose thereof, to effect and accomplish the following, among other things, to-wit:

(a) To create and maintain a monopoly in the sale of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia.

(b) To arbitrarily, unlawfully, unreasonably and knowingly raise, fix, control, act, stabilize and affect the price of emulsified asphalt shipped in interstate commerce, as aforesaid, into the State of Georgia, and purchased by

the State Highway Department of Georgia, for and on behalf of the State of Georgia.

(c) Establish and maintain unreasonably high, excessive, monopolistic and non-competitive prices on emulsified asphalt shipped in inter-state commerce, as aforesaid, into the State of Georgia, for purchase and use by the State Highway Department of Georgia, for and on behalf of the State of Georgia.

(d) Arbitrarily, unlawfully, unreasonably and knowingly to prevent, suppress, and eliminate competition in the sale of emulsified asphalt shipped in inter-state commerce, as aforesaid, into the State of Georgia, for purchase and use by the State of Georgia through its State Highway Department.

XXIII.

As a part of the unlawful monopoly, attempt to so monopolize, and combination and conspiracy to monopolize, and pursuant thereto and in furtherance thereof, and to effectuate its object and purposes defendants herein named and divers other persons, did do and perform certain acts and things and did use divers means and methods, including among other things, the following, to-wit:

(a) In or about January, 1937, defendant Hiram Wesley Evans organized and caused to be organized at Atlanta, Georgia, a partnership under the name of Southeastern Construction Company, for the purpose of engaging in the promotion and sale of emulsified asphalt in the State of Georgia, and especially to the State Highway Department of Georgia.

(b) In or about April, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company, entered into an agreement and understanding with one, A. W. Mohr, acting on behalf of the defendant, American Bitumuls Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said American Bitumuls Company were to be handled by said Evans. It was a part of said agreement and understanding that the said American Bitumuls Company should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans. Said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times from on or about June, 1936, to May 30th, 1940.

(c) In or about July, 1936, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company, entered into an agreement and understanding with one, Alex McDougald, acting on behalf of defendant Emulsified Asphalt Refining Company, whereby all sales in the State of Georgia of emulsified asphalt manufactured by said Emulsified Asphalt Refining Company, were to be handled by said Evans. It was a part of said agreement and understanding that the said Emulsified Asphalt Refining Company should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans. Said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect from on or about July, 1936, to May 30th, 1940.

(d) In or about March, 1937, at Atlanta, Georgia, defendant, Hiram Wesley Evans, either in his own name or on behalf of the said Southeastern Construction Company, entered into an agreement and understanding with one, J. S. Sawyer, acting on behalf of defendant, Shell Oil Company, Inc., (or its predecessor corporation), whereby all sales in the State of Georgia of emulsified asphalt manufactured by said Shell Oil Company, Inc., (or its predecessor corporation), were to be handled by said Evans. It was a part of said agreement and understanding that the said Shell Oil Company, Inc., (or its predecessor corporation), should submit bids in its own name to the State Highway Board of Georgia at prices directed by said Evans. Said Evans was to receive a commission or other compensation on each sale of emulsified asphalt in the State of Georgia. Said agreement and understanding continued in force and effect at all times from on or about March, 1937, to May 30th, 1940.

(e) In or about May, 1937, defendant Evans and other persons acting at his instance changed and caused to be changed the specifications covering emulsified asphalt to be purchased by the State Highway Board of Georgia so that only the emulsified asphalt manufactured by the defendant manufacturers of said product and handled and sold by defendant Evans, as aforesaid, would be acceptable or conform thereto, thereby eliminating competition from competitors and prospective competitors of defendant Evans and the said defendant manufacturers of emulsified asphalt.

(f) In or about May, 1937, defendant, John W. Greer, Jr., acting in his capacity as purchasing agent for the State Highway Department of Georgia and in concert and collusion with defendant Evans, and in furtherance of the aforesaid monopoly, attempt to monopolize, and combina-

tion and conspiracy to monopolize sent and caused to be sent to said defendant manufacturers of emulsified asphalt, several of their representatives, Southeastern Construction Company, and defendant Evans, notice of the change in specifications set forth in sub-paragraph (e) above, at the same time and thereafter failing and refusing to furnish said notice to competitors of said defendant manufacturers and of defendant Evans.

(g) At all times after the date of the change in said specifications referred to in sub-paragraph (e) hereof, defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia, notified the defendant Evans and the defendant manufacturers of the proposed purchases of emulsified asphalt, at the same time and thereafter failing and refusing to notify competitors and prospective competitors of said Evans and said defendant manufacturers.

(h) At all times after the change in the specifications referred to in sub-paragraph (e) the defendant, John W. Greer, Jr., acting in the capacity of purchasing agent for the State Highway Department of Georgia, and in concert and collusion with defendant Evans, refused to accept and rejected all bids submitted and attempted to be submitted by competitors and prospective competitors of defendant Evans and defendant manufacturers, even though such bids were lower than those submitted by defendants named herein.

(i) The price contained in all emulsified asphalt bids submitted to the State Highway Board of Georgia, and the price paid by the State Highway Board of Georgia for emulsified asphalt were unreasonable and excessive and were dictated, controlled, set and fixed in the monopoly, attempt to monopolize and the combination and conspiracy to monopolize in the following manner:

(1) Pursuant to the arrangements and agreements set forth in sub-paragraph (a) to (d) inclusive, defendant Evans submitted and caused to be submitted in the name of the Southeastern Construction Company bids on emulsified asphalt to be purchased by the State Highway Board of Georgia. If said Southeastern Construction Company was the low bidder and was awarded the order for said asphalt, defendant Evans furnished the State Highway Department of Georgia with emulsified asphalt manufactured by said defendant, American Bitumuls Company.

(2) In further pursuance of the aforesaid arrangements and agreements set forth in sub-paragraphs (a) to (d) inclusive, defendant Evans directed the price to be contained in the bid submitted by the said defendant manufacturers of emulsified asphalt in their own names to the State Highway Board of Georgia.

(3) The said defendant manufacturers in submitting bids in their own names to the State Highway Board of Georgia, submitted the price directed by defendant Evans as aforesaid.

(4) The said defendant manufacturers acting as aforesaid thereby permitted defendant Evans to predetermine which of said corporations should submit the lowest bid.

(5) The defendant manufacturer of emulsified asphalt, submitting in accordance with directions from defendant Evans, the lowest bid was awarded the order for emulsified asphalt by the State Highway Board of Georgia, at the price so fixed, controlled, set and predetermined as aforesaid.

(6) The defendant manufacturers of emulsified asphalt receiving said order from the State Highway Board of Georgia at the price fixed, controlled, set and predeter-

mined as aforesaid, shipped the same in inter-state commerce from its refinery located outside of the State of Georgia designated or directed by the State Highway Board.

(j) On or about March 29th, 1938, defendant John W. Greer, Jr., acting in his official capacity as purchasing agent for the State Highway Department of Georgia, attempted to reject a bid submitted by one, Samuel E. Finley, selling emulsified asphalt manufactured by the Texas Company, which had been submitted as a result of an invitation extended by a subordinate of said John W. Greer, Jr., without his knowledge and through inadvertence, because said bid was lower than the bid submitted by the defendant Evans and the said defendant manufacturers. The said John W. Greer, Jr., on said occasion, upon discovering that the low bid had been submitted by Finley and that Finley had, through, inadvertence of a subordinate of Greer, been invited to bid thereon, attempted to cancel all invitations, and extend new invitations to the defendants Evans and the defendant manufacturers, but excluding the said Finley.

(k) As a result of said incident above referred to, and in or about April, 1938, defendant John W. Greer, Jr., acting in concert and collusion with defendant Evans, in furtherance of said monopoly, attempt to monopolize, and combination and conspiracy to monopolize, knowingly and deliberately divided large orders for emulsified asphalt for single road projects under the jurisdiction and control of the State Highway Board of Georgia into numerous small orders of less than \$500.00 each, for the purpose of awarding same to the defendant, Hiram Wesley Evans, without receiving competitive bids therefor, at a price fixed and agreed upon by said defendants.

(1) During the period from May, 1937, to March 28th, 1938, inclusive, as a result of said monopoly, attempt to monopolize, and combination and conspiracy to monopolize, through the arrangements, agreements and acts set forth in sub-paragraphs (a) to (k) inclusive, defendant Hiram Wesley Evans, received a commission or other compensation on each gallon of emulsified asphalt purchased by the State Highway Board of Georgia, at prices fixed, maintained, and controlled as aforesaid, which said prices were excessive and unreasonable.

XXIV.

The monopoly, attempt to monopolize and combination and conspiracy to monopolize, herein alleged was commenced and has been operated and carried on by said defendants during and throughout the period of time aforesaid and in pursuance thereof said defendants named herein performed, among other things, the following acts.

(a) Beginning in or about April, 1937, attempted to monopolize the sale of emulsified asphalt to the State Highway Board of Georgia at Atlanta, Georgia.

(b) On or about Oct. 19th, 1937, shipped emulsified asphalt in interstate commerce from New Orleans, La., to Blue Ridge, Fannin Co., Georgia.

(c) On or about Nov. 1st, 1937, submitted to the State Highway Board of Georgia at Atlanta, Ga., bids on emulsified asphalt to be shipped in interstate commerce into the State of Georgia, at prices established, fixed, raised, set and stabilized by the defendant, Hiram Wesley Evans.

(d) On or about March 1st, 1937, and on various days and dates thereafter, at Atlanta, Georgia, met, conferred and communicated with one another, and with others for

the purpose of monopolizing, attempting to monopolize and combining and conspiring to monopolize as aforesaid.

(c) On or about October 4th, 1937, and on various days and dates thereafter at Atlanta, Georgia, sold emulsified asphalt to the State Highway Board of Georgia, at prices established, fixed, raised, controlled, set and stabilized, which said prices were unreasonable and excessive.

(f) On or about January 1st, 1937, and on various days and dates thereafter at Atlanta, Georgia, negotiated, entered into, and carried on arrangements for selling emulsified asphalt in monopolizing, attempting to monopolize, and combining and conspiring to monopolize as aforesaid.

(g) On or about January 1st, 1937, at Atlanta, Georgia, organized the Southeastern Construction Company for the purpose of selling emulsified asphalt in the attempt to monopolize as aforesaid.

(h) Did do and perform all of the other acts and things hereinbefore alleged.

XXV.

While said conspiracy, arrangement and understanding between the defendants named herein was in existence, the State Highway Department purchased from defendant, Hiram Wesley Evans, doing business as Southeastern Construction Company, a total of 2,480,980 gallons of emulsified asphalt at and for the sum of \$285,019.96, which price was unreasonable and excessive due to the unlawful and illegal conspiracy, agreements and arrangements between the defendants named herein to raise, fix, maintain and control said prices. The reasonable price at which

said amount of emulsified asphalt could have been purchased under natural and free competitive conditions was \$199,222.69. As a result of said conspiracy so existing at the time these purchases were made from said defendant the State of Georgia has suffered damage and jury in its property in the actual amount of \$85,797.27, and is entitled under Section 4 of said Sherman Anti-Trust Act, Title 15, U. S. C. A., Section 15, to threefold damages in the amount of \$257,391.81.

XXVI.

During the existence of said illegal conspiracy, combination, agreement and arrangement, as aforesaid, the State Highway Department of Georgia purchased from the defendant, Emulsified Asphalt Refining Company, a total of 1,272,131 gallons of emulsified asphalt at and for the sum of \$131,376.56. The price paid to said defendant for said asphalt was, as a direct and proximate result of said illegal conspiracy, combination, agreement and arrangement whereby the price thereof was raised, fixed and determined by defendant Evans, excessive and unreasonable, in that the State Highway Department could have purchased said amount of asphalt in a free and competitive market, under natural competitive conditions, at and for the sum of \$102,152.11. The State of Georgia has, on account of said illegal conspiracy, combination, agreement and arrangement on the part of the Emulsified Asphalt Refining Company and the other named defendants herein, been actually injured and damaged in its property in the sum of \$29,224.45, and under Section 4 of said Sherman Anti-Trust Act (Title 15 U. S. C. A. Section 15) is entitled to threefold damages in the amount of \$87,673.35.

XXVII.

While said illegal conspiracy, combination, agreement and arrangement, as aforesaid, was in existence the State

Highway Department of Georgia purchased from the defendant, Shell Oil Company, (or its predecessor corporation), in the manner above alleged the total of 689,055 gallons of emulsified asphalt at and for the price of \$68,336.52, which price was excessive and unreasonable, in that the reasonable price and value of said amount of asphalt under free and natural competitive conditions was only \$55,331.11. As a direct and proximate result of said illegal conspiracy, combination agreement and arrangement on the part of the Shell Oil Company, the State of Georgia has been actually damaged and injured in its property in the sum of \$13,005.41, and by virtue of Section 4 of the Sherman Anti-Trust Law (Title 15 U. S. C. A. Section 15) is entitled to recover threefold damages of said defendant in the amount of \$39,016.23.

Wherefore, the State of Georgia prays judgments for said amounts as compensation for its injuries and damages sustained in the manner and the amounts as above alleged, together with interest thereon and costs.

ELLIS ARNALL,

Attorney General,

ANDREW J. TUTEN,

Assistant Attorney General,

E. L. REAGAN,

Assistant Attorney General,

PRESTON RAWLINS,

Assistant Attorney General,

CARLTON MOBLEY,

Assistant Attorney General,

LINTON S. JOHNSON,

Assistant Attorney General,

EMIL J. CLOWER,

Assistant Attorney General,

C. E. GREGORY, JR.,

Assistant Attorney General,

Counsel for State of Georgia.

MOTION OF HIRAM W. EVANS TO DISMISS COMPLAINT.

26

(Title Omitted.)

Comes now the defendant, Hiram W. Evans, and respectfully moves that the complaint against him herein be dismissed for the following reasons:

1.

The plaintiff herein is the State of Georgia, and the State of Georgia is not a person upon whom a right of action is conferred by Section 7 of the Acts of Congress, commonly referred to as the Sherman Act, (Title 15, U. S. C. A., Section 15).

2.

A right of action to recover treble damages for injuries sustained by reason of a violation of the Anti-Trust Statutes of the United States and the remedy to enforce such right are conferred only by Section 7 of the Acts of Congress, commonly known as the Sherman Act, (Title 15, U. S. C. A., Section 15) and the plaintiff herein, the State of Georgia, is not a person upon whom either the right or the remedy is conferred by said section, and this Court is without jurisdiction of the subject-matter of this action.

3.

No right to sue for any of the damages alleged in the complaint and no remedy to enforce any such right in the Courts of the United States are conferred upon the plaintiff, the State of Georgia, by any of the statutes relied upon in the complaint, and the complaint should be

dismissed for lack of jurisdiction of the subject-matter by this Court and for want of a proper party plaintiff.

Wherefore, defendant, Hiram W. Evans, prays that this motion be sustained and the complaint be dismissed.

MORGAN BELSER,
E. CLEM POWERS,
JONES, POWERS & WILLIAMS,
Attorneys for Defendant,
Hiram W. Evans.

Filed Apr. 10, 1941.

MOTION TO DISMISS OF JOHN W. GREER, JR.

28

(Title Omitted.)

Now comes the defendant John W. Greer, Jr., within the time required by law and before filing responsive pleading, respectfully moves the Court to dismiss the said action as to this defendant, upon the following grounds:

1.

For lack of jurisdiction of the Court over the subject matter, in that the State of Georgia is not a "person injured in his business or property by anything forbidden in the anti-trust laws", within the meaning of the Act of Congress of July 2, 1890, c. 647, section 8, 26 Stat. 210, 15 U. S. C. A. 7, or of the Act of October 15, 1914, c. 323, section 4, 38 Stat. 731, 15 U. S. C. A. 15; nor is there any other applicable Federal statute, authorizing the bringing of said action in this Court by the plaintiff.

For failure to state a claim upon which relief may be granted, in that said action by the State of Georgia as plaintiff is not authorized by any of the several statutes referred to in the first ground of this motion above, or by any other statute of the United States, nor is the same maintainable by the State of Georgia in said Court under any other principle or provision of the law.

Wherefore defendant John W. Greer, Jr., prays

(1) That his said motion to dismiss be inquired into by the Court and sustained, and

(2) That he be not required further to plead until after disposition of his said motion.

HAL LINDSEY,

Attorney for Defendant John
W. Greer, Jr.

Filed Apr. 10, 1941.

MOTION OF AMERICAN BITUMULS COMPANY TO
DISMISS COMPLAINT.

American Bitumuls Company respectfully moves the Court that the complaint against it herein be dismissed for the following reasons:

1.

The plaintiff herein is the State of Georgia, and the State of Georgia is not a person upon whom a right of action is conferred, as alleged in the second paragraph of the complaint, by the Acts of Congress of October 15, 1914, Chapter 323, Section 4; 38 Statutes 731; U. S. C. Title 15, Section 15, and the Act of July 2nd, 1890, Chapter 647, Section 1; 26 Statutes, 209; U. S. C. Title 15, Section 1, or by either of such Acts.

2.

A right of action to recover treble damages for injuries sustained by reason of a violation of the Anti-Trust Statutes of the United States and the remedy to enforce such right are conferred only by Section 7 of the Acts of Congress, commonly known as the Sherman Act, (Title 15, U. S. C. A., Section 15) and the plaintiff herein, the State of Georgia, is not a person upon whom either the right or the remedy is conferred by said section, and this Court is without jurisdiction of the subject-matter of this action.

3.

No right to sue for any of the damages alleged in the complaint and no remedy to enforce any such right in the Courts of the United States are conferred upon the plaintiff, the State of Georgia, by any of the statutes relied upon in the complaint, and the complaint should be dismissed for lack of jurisdiction of the subject-matter by this Court and for want of a proper party plaintiff.

Wherefore, defendant, American Bitumuls Company, prays that this motion be sustained and the complaint be dismissed.

PILLSBURY, MADISON &
SUTRO,

Standard Oil Building,
San Francisco, California.

TAYLOR, PORTER, BROOKS
& FULLER,

Louisiana National Bank Bldg.,
Baton Rouge, Louisiana.

BARRY WRIGHT,

Rome, Georgia.

Attorneys for Defendant,
American Bitumuls Com-
pany.

MOTION OF SHELL OIL COMPANY, INC., TO
DISMISS.

32

(Title Omitted.)

Comes now Shell Oil Company, Inc., one of the defendants in the above stated cause, and files this its motion to dismiss the complaint in the above stated cause and for grounds of its motion shows respectfully as follows:

1.

Plaintiff in this cause is the State of Georgia. The State of Georgia is not a person upon whom a right of action is conferred by Section 7 of the Act of Congress ordinarily referred to as the Sherman Act (U. S. C. A. Title 15, section 15).

The cause of action sought to be asserted in the complaint herein is one for triple damages, alleged in the complaint to arise because of a violation of the Anti-Trust Act of the United States. The remedy to enforce such cause of action is found only in Section 7 of the Sherman Act (U. S. C. A. Title 15, section 15). The State of Georgia, which is the plaintiff in this cause, is not a person upon whom is conferred any right or any remedy by reason of said statute and this Court is without jurisdiction of the subject-matter hereof.

The State of Georgia is not such a person as is given any right to sue for any damages, such as is alleged in the complaint in this cause, and no remedy to enforce any such right is given to the plaintiff, the State of Georgia, by any of the statutes referred to in the complaint herein. There is no jurisdiction in this Court under any of said statutes referred to in the complaint and the complaint should be dismissed for lack of jurisdiction of the subject-matter of the complaint, and also because there is no proper person as plaintiff in this cause, such as is given the right by the said statutes.

Wherefore, Shell Oil Company, Inc. prays that this its motion be sustained and the complaint herein dismissed.

ALSTON, FOSTER, MOISE, &
SIBLEY,

E. W. MOISE,

Attorneys for Shell Oil Company, Inc., Defendant.

MOTION TO DISMISS OF EMULSIFIED ASPHALT
REFINING COMPANY.

34

(Title Omitted.)

Comes now Emulsified Asphalt Refining Company, one of the defendants in the above case, and moves the Court to dismiss the complaint for the following reasons:

1.

The facts set out in the complaint do not entitle the plaintiff to any relief prayed for against this defendant.

2.

The said complaint is predicated entirely on certain Federal statutes, as pointed out in the third paragraph of this complaint. The complainant herein is, as a matter of law, not entitled to sue under said statutes, and is not entitled to any rights under said statutes, and is not entitled to pursue any of the remedies given by the said statutes.

3.

The said statutes above referred to, being the statutes known as the Sherman Anti-Trust Act, and the various statutes amendatory thereto, purport to give a right of action to any person injured or damaged by the things named in said statutes, and the complainant, The State of Georgia, is not a person within the meaning of the term as used in said statutes, and hence is not entitled to maintain the said suit.

Wherefore said defendant moves that the said case be dismissed.

HIRSCH, SMITH & KIL-
PATRICK,

Attorneys for Defendant, Emul-
sified Asphalt Refining Com-
pany.

Filed Apr. 10, 1941.

OPINION AND ORDER SUSTAINING MOTION OF
HIRAM, W. EVANS AND DISMISSING COM-
PLAINT.

36

(Title Omitted.)

The above Motion to Dismiss came on regularly to be heard and was argued orally and by brief.

The petition alleges a cause of action against defendant under the Sherman Anti-Trust Act, 15 U. S. C. A. section 15, and defendant moves to dismiss the action on the ground that the State of Georgia is not "a person" as the term is defined in Section 7 of the Act and therefore is not authorized to proceed under the Act.

The United States Supreme Court, in the recent case of United States vs. Cooper Corporation, U. S. (61 S. Ct. Rep. 742), held that the United States was not a "person" within the Sherman Anti-Trust Act, authorizing any "person" to maintain a civil action for treble damages for injuries resulting from violation of the Act, but that the meaning of the word was "limited to what are usually known as natural and artificial person, that is, individuals and corporations."

The reasoning in this decision is equally applicable to this case where the State of Georgia is plaintiff, and under authority of this case, which of course is controlling here, it is ordered and adjudged that said motion be, and same hereby is sustained and said action against this movant dismissed.

This 31st day of July, 1941.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed July 31, 1941.

45 Opinions and Orders sustaining Motions of John W. Greer, Jr.—The American Bithumals Company—Shell Oil Company Inc. and Emulsified Asphalt Refining Company, and Dismissing Complaint, omitted from the printed record said Opinions and orders being the same as the opinion and order sustaining motion of Hiram W. Evans, heretofore copied at page 34.

46

NOTICE OF APPEAL.

(Title Omitted.)

Notice is hereby given that the State of Georgia, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgments entered in this action on July 31, 1941, sustaining the motion of each of the defendants above

named to dismiss the action as to said defendant and dismissing the action against each of said defendants.

ELLIS G. ARNALL,

Attorney for Appellant, the
State of Georgia.

Filed Aug. 30, 1941.

STATEMENT OF POINTS (ASSIGNMENTS OF ERROR).

(Title Omitted.)

Notice of Appeal having been filed, the State of Georgia, Appellant, makes the following statement of points and assigns the following errors in the record and proceedings in this case:

1.

The said District Court erred in sustaining the motions of the defendants to dismiss the petition on the grounds that the State of Georgia is not a "person" upon whom a right of action for treble damages is conferred under Section 7 of the Act of July 2, 1890, C. 647, 26 Stat. 209, 210, 15 U. S. C. A. Section 15, commonly known as the Sherman Act.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the judgments and decrees of the District Court of the United States for the Northern District of Georgia, Atlanta Division, dated July 31, 1941, in the above entitled cause, be reversed and a decree rendered in favor of this complainant.

ELLIS G. ARNALL,

(Ellis G. Arnall),

Attorney for the State of
Georgia, Appellant.

Service of the foregoing statement of points (assignments of error) acknowledged and copy received.

This 3rd day of September, 1941.

MORGAN BELSER,

Attorney for Hiram W. Evans,

Appellee,

HAL LINDSAY,

Attorney for John W. Greer,

Jr., Appellee,

B. B. TAYLOR,

Baton Rouge, La.

BARRY WRIGHT,

Rome, Ga.

Attorney for the American
Bitumuls Company, Appel-
lee.

E. W. MOISE,

Attorney for Shell Oil Com-
pany, Inc., Appellee,

MARION SMITH,

Attorney for Emulsified As-
phalt Refining Company,
Appellee.

Filed Sept. 4, 1941.

DESIGNATION OF CONTENTS OF RECORD.

49

(Title Omitted.)

Notice of Appeal having been filed, the State of Georgia, Appellant, designates the following portions of the record

as material to a clear understanding of the issue and to be contained in the record on appeal.

1. The complaint.
2. Motion of Hiram W. Evans to dismiss the complaint.
3. Motion of John W. Greer, Jr. to dismiss the complaint.
4. Motion of The American Bitumuls Company to dismiss the complaint.
5. Motion of Shell Oil Company, Inc. to dismiss the complaint.
6. Motion of Emulsified Asphalt Refining Company to dismiss the complaint.
7. Judgment entered July 31, 1941, dismissing the action as to Hiram W. Evans.
8. Judgment entered July 31, 1941, dismissing the action as to John W. Greer, Jr.
9. Judgment entered July 31, 1941, dismissing the action as to the American Bitumuls Company.
10. Judgment entered July 31, 1941, dismissing the action as to Shell Oil Company, Inc.
11. Judgment entered July 31, 1941, dismissing the action as to Emulsified Asphalt Refining Company.
12. Notice of appeal.

13. Statement of points (assignments of error).
14. Designation of contents of record.
15. Clerk's certificate.

ELLIS G. ARNALL,
(Ellis G. Arnall),
Attorney for the State of
Georgia, Appellant.

Service of the foregoing designation of record acknowledged and copy received.

This 3rd day of September, 1941.

MORGAN BELSER,
Attorney for Hiram W. Evans,
Appellee.

HAL LINDSAY,
Attorney for John W. Greer,
Jr., Appellee.

B. B. TAYLOR,

Baton Rouge, La.

Rome, Ga.

BARRY WRIGHT,

Attorney for The American
Bitumuls Company, Appel-
lee,

E. W. MOISE,

Attorney for Shell Oil Com-
pany, Inc., Appellee,

MARION SMITH,

Attorney for Emulsified As-
phalt Refining Company,
Appellee.

Filed Sept. 4, 1941.

51

CLERK'S CERTIFICATE.

United States of America,
Northern District of Georgia. ss.

I, F. L. BEERS, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 50 pages contains a true, full, complete and correct copy of the original record, statement of points and all proceedings had in the matter of State of Georgia, Appellant, vs. Hiram W. Evans, John W. Greer, Jr., The American Bitumuls Company, Shell Oil Company, Inc., Emulsified Asphalt Refining Company, Appellees, as specified in the designation of contents of record herein and as the same remains of record and on file in the Clerk's office of the said District Court, at Atlanta, Georgia.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 5th day of September, A. D. 1941.

F. L. BEERS,

(Seal) ✱

Clerk, United States District
Court, Northern District of
Georgia,

By C. A. McGREW,

(C. A. McGrew),

Deputy Clerk.

[fol. 41] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 15th, 1941

No. 10,059

STATE OF GEORGIA

versus

HIRAM W. EVANS et al.

On this day this cause was called, and, after argument by Ellis Arnall, Esq., Attorney General of Georgia, for appellant, and Marion Smith, Esq., for appellees, was submitted to the Court.

[fol. 42] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10059

STATE OF GEORGIA, Appellant,

versus

HIRAM W. EVANS et al., Appellees

Appeal from the District Court of the United States for
the Northern District of Georgia

(October 30, 1941)

OPINION OF THE COURT—Filed October 30, 1941

Before Foster, Hutcheson, and McCord, Circuit Judges

By the COURT:

The state of Georgia, through its Attorney General, brought this suit against American Bitumuls Co., Shell Oil Co., Inc., Emulsified Asphalt Refining Co., Hiram Wes-

ley Evans, a dealer in mulsified asphalt and John W. Greer, Jr., purchasing agent for the State Highway Board of Georgia, to recover damages, alleging the parties named and others had engaged in a conspiracy to control the sale of mulsified asphalt throughout the United States, in violation of the Sherman Anti-Trust Act of July 2, 1890. The complaint further alleged that the state of Georgia had been damaged in the amount of \$13,005.41, through the payment of excessive prices for asphalt purchased. The prayer was for recovery of \$39,016.23. Defendants moved to dismiss the suit on the ground that the state of Georgia is not a "person" entitled to bring such an action under the provisions of Sec. 7 of the Sherman Anti-Trust Act, T. 15 U. S. C. A. §15. The motions were granted and the suit dismissed.

The state of Georgia is a sovereign. The case is controlled by the decision of the Supreme Court in *United States vs. Cooper Corporation*, 312 U. S. 600. On the authority of that decision the judgment is Affirmed.

[fol. 44]

JUDGMENT

Extract from the Minutes of October 30th, 1941

No. 10,059

STATE OF GEORGIA

versus

HIRAM W. EVANS et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, State of Georgia, be condemned to pay the costs of this cause in this Court.

[fol. 49]

ORDER DENYING REHEARING

Extract from the Minutes of December 15, 1941

No. 10,059

STATE OF GEORGIA

VERSUS

HIRAM W. EVANS, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 50] MOTION AND ORDER STAYING MANDATE—Filed December 24th, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 10,059

STATE OF GEORGIA

VERSUS

HIRAM W. EVANS, JOHN W. GREER, JR., THE AMERICAN BITUMENS COMPANY, The Shell Oil Company, Inc., Emulsified Asphalt Refining Co.

REQUEST FOR STAY OF MANDATE

To the Honorable Judges of said Court:

Now comes the state of Georgia, appellant in said case, and shows as follows:

Judgment was entered October 30, 1941, affirming the judgment of the District Court. Appellant's petition for rehearing was filed November 17, 1941. Rehearing was denied December 15, 1941. Appellant intends to apply to the Supreme Court of the United States for a writ of certiorari, believing it has good cause and grounds for the

granting of said writ, and is now engaged in the preparation of the writ and a brief in support thereof. A stay of the mandate and of the execution of the judgment in this case will work no hardship on the respondents.

Wherefore, appellant prays that the issuance of the mandate of this court and the execution of its judgment be stayed for a period of three months from October, 1941, excluding the time between November 17, 1941, the date of filing the petition for rehearing, and December 15, 1941, the date on which rehearing was denied; that if the application for writ of certiorari is perfected and the case docketed in the Supreme Court of the United States within the period of the stay, the mandate and the execution of the judgment be [fol. 51] further stayed until the application for writ of certiorari has been acted on by the Supreme Court of the United States; that if the writ be granted, the mandate and execution of the judgment be further stayed until the cause has been finally determined by the Supreme Court of the United States; or upon the terms and conditions established by the judge or judges passing upon this request.

(Signed) Ellis Arnall, Attorney General of Georgia,
Counsel for Appellant.

I hereby certify that I have given notice of the foregoing request for a stay of the mandate to counsel of record for the appellees and to each of them, by inserting copies in separate envelopes addressed to Hon. Hal Lindsay, attorney for John W. Greer, Jr., Hurt Building, Atlanta, Georgia; Hon. Barry Wright, Attorney for American Bitumuls Company, Rome, Georgia; Hon. B. B. Taylor, Attorney for American Bitumuls Company, Louisiana National Bank Building, Baton Rouge, La., Hon. Morgan Belser, Attorney for Hiram W. Evans, Citizens and Southern National Bank Building, Atlanta, Georgia; Hon. E. W. Moise, Attorney for Shell Oil Company, Inc., Citizens and Southern National Bank Building, Atlanta, Georgia; Hon. Marion Smith, Attorney for Emulsified Asphalt Refining Company, Hurt Building, Atlanta, Georgia, sealing and stamping said envelopes and depositing the same in the United States Mail.

This the 22 day of December, 1941.

(Signed) Ellis G. Arnall, Attorney for Appellant.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH DISTRICT

No. 10059

STATE OF GEORGIA, Appellant,

versus

HIRAM W. EVANS, et al., Appellees

On consideration of the application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of sixty days; the stay to continue in force until the final disposition of the case by the Supreme Court; provided that within sixty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of sixty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 24th day of December,
1941.

(Signed) Rufus E. Foster, United States Circuit
Judge.

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9291)